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No. 85-1342

In the

Supreme Court of the United States

OCTOBER TERM, 1985

CHICAGO PARK DISTRICT, et al.,

Petitioners,

v.

SILAS J. ALEXANDER, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO GRANT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Where this Court, and each appellate court which has considered the issue, has concluded that Title VII, 42 U.S.C. Section 2000e et seq., unequivocally preserves the right of state and local government employees to bring actions for race discrimination in employment under the Fourteenth Amendment Equal Protection Clause and Section 1983, should a petition for certiorari which seeks a contrary ruling be granted?

PARTIES TO PROCEEDING

The named plaintiffs in this class action include:

> Silas J. Alexander, Karen Turner, Reneé Bradford, Lillian Schrean, Joel Alexander, Earline Oglesby, Martha McGee, Althea Tucker, Rosemary Garrett, Latoski McCarthy Dillion, Beverly Gray, Anthony Gray, Arlene Gaston, Willie Gaston, Angel Gomez, Juan Gomez, Luis Diaz, Luis Flores, Comite Latino, Clara Evans, Christopher Delano Barnett, Oscar Wells, Terry Lee Fisher, Agnes Bernaugh, William Hall, Charles Adkins, Natalie Lyle.

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RESPONDENTS' BRIEF IN OPPOSITION TO GRANT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondents, SILAS J. ALEXANDER, ET AL. ("ALEXANDER"), in accordance with Rule 22 of the Supreme Court Rules, hereby respectfully submit their BRIEF in OPPOSITION to the Petition for Writ of Certiorari of the CHICAGO PARK DISTRICT, ET AL. ("DISTRICT").

JURISDICTION

The judgment of the court of appeals was entered on September 19, 1985. A petition for rehearing was denied November 13, 1985. The DISTRICT, invoking this court's jurisdiction under 28 U.S.C. 1254 (1), filed a Petition for

Certiorari which was received by ALEXANDER on February 10, 1986. ALEXANDER'S BRIEF IN OPPOSITION thereto is submitted pursuant to Rule 22 of the Supreme Court Rules.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST. amend XIV, Sec. 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. Sec. 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

The text of 42 U.S.C. Section 2000e to 2000e-17 is set forth in the DISTRICT's Appendix, at p. 67a.

STATEMENT OF CASE

On October 24, 1984, the trial court, *inter alia*, dismissed those counts of the ALEXANDER Complaint, pending

since 1979, in which the DISTRICT was charged with racial and ethnic employment discrimination in violation of the Fourteenth Amendment. The court dismissed these counts on the ground that Title VII of the Civil Rights Act, as amended, 42 U.S.C. Section 2000e et seq., preempted ALEXANDER's right to sue the District for violation of their constitutional right to be free of race discrimination in employment. (The trial court's order appears at page 16a of the DISTRICT's Appendix.)

On November 20, 1984, ALEXANDER appealed, *inter alia*, the dismissal of the employment discrimination counts to the Seventh Circuit. On September 19, 1985, the Seventh Circuit affirmed certain portions of the trial court's order, but reversed the district court's dismissal of the employment discrimination counts, holding that they were not preempted by Title VII, and remanded them for trial. (The opinion of the Court of Appeals appears at page la of the DISTRICT's Appendix).

On October 3, 1985, the DISTRICT filed a Petition for Rehearing respecting dismissal of the employment discrimination counts. On November 13, 1985, the Seventh Circuit modified certain language in its earlier order (not here relevant), but denied the DISTRICT's Petition for Rehearing, in which it had argued that Title VII preempts the right of state and local government employees to bring suit for race discrimination in employment under the Equal Protection Clause.

On February 10, 1986, the DISTRICT filed a Petition for Writ of Certiorari delimited to the issue of Title VII's preemptive effect. ALEXANDER has filed a cross-petition seeking review of the question whether the trial judge's denial of the ALEXANDER for disqualification contravenes 28 U.S.C. Sections 144 and 455 (a).

I.

REASONS FOR DENYING THE WRIT

THE *NOVOTNY* DECISION AND OTHER DECISIONS OF THIS COURT REFUTE THE PROPOSITION THAT TITLE VII AFFORDS THE EXCLUSIVE REMEDY TO STATE AND LOCAL GOVERNMENT EMPLOYEES WHO SUE THEIR EMPLOYER FOR RACE DISCRIMINATION.

The DISTRICT argues that this Court's decision in *Great American Federal Savings and Loan Association* v. *Novotny*, 442 U.S. 336 (1979) limits state and local government employees to Title VII as a means of redressing racial discrimination in employment. The narrow holding of that case fails to support the DISTRICT'S contention. *Novotny*, a male, sued his private employer in federal court, charging intentional denial of equal employment opportunities for female employees. *Novotny* predicated his first cause of action on 42 U.S.C. Section 1985 (3), claiming he was entitled to damages because he had been injured as the result of a conspiracy to "deprive him of equal protection of, and equal privileges and immunities under the laws." In his second cause, he alleged that his discharge was in retribution for his efforts on behalf of equal employment opportunity in violation of Section 704 (a) of Title VII. This Court held that the deprivation of a right *created* by Title VII cannot be the basis for a cause of action under Section 1985(3). In so ruling, the Court first noted that Section 1985(3) provides no substantive rights; it merely provides a remedy for rights it designates. The Court then stressed that the legislative history of Title VII makes clear that *although causes of action under 42*

U.S.C. Section 1981 and 1983 are not preempted, the legislative history is silent regarding 42 U.S.C. Section 1985(3).

> During the course of the legislative debates on both the Civil Rights Act of 1964 and the 1972 Amendments to the 1964 Act, the view was consistently expressed that the earlier statutes would not be implicitly repealed (cite). Specific references were made to Section 1981 and 1983, but, significantly, no notice appears to have been taken of Section 1985 . . . 442 U.S. at 377, n.21.

The Court also pointed out that the situation in *Novotny* differs markedly from other cases in which it has been held that the violation of *substantive rights conferred by the Constitution* are actionable under nineteenth century civil rights laws (i.e.: the right to be free from racial discrimination in public accommodations, 42 U.S.C. 2000(a)) and have not been withdrawn, *sub silentio,* by the subsequent passage of modern statutes. *Novotny's* statutory claims under Section 704(a) (proscription against retaliation) did not even arguably exist before the passage of Title VII. In light of the fact that the legislative history of Title VII is silent regarding preservation of remedies *under 42 U.S.C. Section 1985(3)*, the Court was unwilling to permit *Novotny* to avoid Title VII's proscription of compensatory damages and trial by jury.

The distinctions between *Novotny* and *Alexander* are many and manifest:

> (1) *Novotny's* claim was brought against a *private* employer; ALEXANDER sued the DISTRICT, which satisfies the "state action" requirement of Section 1983:
>
> (2) Because Novotny sued a *private* employer, not the state, for sex discrimination, Novotny could not

utilize the Fourteenth Amendment which requires "state action". Moreover, *Novotny* alleged ***no other constitutional violations*** (e.g. violation of First Amendment right of association.) *Novotny* based his Section 1985(3) claim solely on a violation of Title VII's anti-retaliation provision (Section 724)

In contrast to *Novotny*:

(1) ALEXANDER charges *race* discrimination, not sex discrimination;

(2) ALEXANDER *does not* allege violation of Title VII or sue under Section 1985(3);

(3) ALEXANDER instead sues under Section 1983; and the legislative history of Title VII makes clear that remedies made available under Section 1983 (unlike Section 1985(3)) are not preempted by Title VII;

(4) ALEXANDER alleges violations of "fundamental constitutional rights" which exist wholly independent of Title VII, including:

> (a) the Fourteenth Amendment right not to be deprived of property or of a liberty interest to engage in an occupation without due process of law (see: *Diulio* v. *Board of Fire and Police Commissioners*, 682 F.2d 666, 668, 669 (7th Cir. 1982));
>
> (b) the Thirteenth Amendment right of black citizens to be free from involuntary servitude (see: *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971)); and,
>
> (c) the right of black citizens to contract without impairment (as provided for by the Civil Rights Act of 1866, now codified at 42 U.S.C. Section 1981).

The inapplicability of *Novotny* to case like ALEXANDER, which charge violation of fundamental constitutional guaranties, was ably articulated by the court in *Skade-*

gaard v. *Farrell,* 575 F.Supp. 1209, 1215-1218 (D.N. J. 1984):

> Plaintiff has alleged violations of her rights under the Fourteenth Amendment for which she seeks relief via Section 1985(3) and 1983. Plaintiff's constitutional rights are undeniably "independent" of those provided in Title VII and, in fact, pre-dated the creation of rights under its statutory scheme by close to one hundred years . . . The plaintiff in *Novotny* was precluded from asserting similar claims under the Fourteenth Amendment because he was employed by a private employer . . . Here, by virtue of plaintiff Skadegaard's state employment, she has additional and independent rights vis-a-vis her employer which she has asserted.

In summary, then, *Novotny* fails to support the DISTRICT'S position that Title VII is preemptive because, as pointed out by the Court in footnote 21 of its opinion, the legislative history of Title VII treats Sections 1981 and 1983 markedly different from Section 1985(3), and Novotny, unlike ALEXANDER, could not allege a violation of the Equal Protection Clause by his *private* employer.

It should also be noted that the Court's *Novotny* decision is consistent with two earlier decisions, in each of which, after review of Title VII's legislative history, the Court concluded that Title VII does not preempt the remedies afforded by nineteenth century civil rights laws. In *Alexander* v. *Gardner-Denver, Co.,* 415 U.S. 36, 47-49 (1974), the Court was required to decide whether an employee who pursued a grievance to a final adverse arbitration decision forfeited his private cause of action under Title VII. The district court had ruled that to permit an employee to do so would be giving "the employee two

strings to his bow" when the employer only has one. In reversing, the Court, as noted, analyzed the legislative history of Title VII:

> . . . legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination. . . Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue, independently, his rights under Title VII and other applicable state and federal statutes. . . The clear inference is that Title VII was designed to supplement rather than supplant existing laws and institutions relating to employment discrimination.

In *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, (1975), decided the following year, the Court used even stronger language in holding that Title VII does not preempt actions under Section 1981:

> . . . Congress noted "that the remedies available to the individual under Title VII are co-extensive with the individual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. Section 1981, and that the two procedures augment each other and are not mutually exclusive". H.R. Rep. No. 92-236, p. 19 (1971), U.S. Code Cong. & Admin. News, 1972, pp. 2137, 2154. See also S.Rep. No. 92-415, p. 24 (1971).

II.

THE SEVENTH CIRCUIT, AND EACH CIRCUIT WHICH HAS CONSIDERED THE ISSUE, HAS CORRECTLY CONCLUDED THAT TITLE VII IS NOT THE EXCLUSIVE REMEDY AVAILABLE TO STATE AND LOCAL GOVERNMENT EMPLOYEES SUBJECTED TO RACE DISCRIMINATION.

In reversing the trial court, the Seventh Circuit did not discuss applicable case law, but instead cited to and

relied upon its decision in *Trigg* v. *Fort Wayne Community Schools,* 766 F.2d 299 (7th Cir. 1985), which was decided three weeks after ALEXANDER was argued. In *Trigg,* the court reviewed the legislative history of Section 2 of the Equal Employment Opportunity Act of 1972 and concluded therefrom that Congress, in amending Title VII in 1972, among other things, to bring "state and local government employees" within the Act's protection, specifically preserved the existing right of such employees to sue for discrimination in employment under Section 1983, 766 F.2d 301.

Actual examination of the legislation history is instructive. The legislative history of the 1972 amendments to Title VII, Subcommittee on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., *Legislative History of the Equal Employment Act of 1972, H.R. 1746 Pub. L. No. 92-261* (Comm. Print 1972) [hereinafter "Legislative History"], extends to *2,067 pages,* and reflects Congressional debate on twenty-eight (28) days. In adopting the 1972 amendments, Congress passed the House bill (H.R. 1746), not the Senate bill (S.2915). See: H.R. Rep. No. 92-238, 92d Cong., 2d Sess. P. 2137. The House bill which became law contains no provision repealing the rights of "state and local government employees" to sue the "state" for employment discrimination under Section 1983. Instead, the legislative history of H.R. 1746 provides:

> In establishing the applicability of Title VII to state and local employees, the Committee wishes to emphasize that the individual's right to file a civil action in his own behalf, pursuant to the Civil Rights Act of 1870 and 1871, 42 U.S.C. sections 1981 and 1983, is in no way affected. During the floor debate surrounding the passage of Title VII of the Civil

Rights Act of 1964, it was made clear that the Act was not intended to preempt existing rights under the National Labor Relations Act or the Railway Labor Act. Title VII was envisioned as an independent statutory authority meant to provide an aggrieved individual with an additional remedy to redress employment discrimination. Two recent court decisions, *Young* v. *International Telephone and Telegraph Co.*, —— F.2d —— 3 FEP Cases 145 (3d Cir. 1970) and *Saunder* v. *Dobbs House,* 431 F.2d 1097 (5th Cir. 1970), have affirmed this Committee's belief that the remedies available to an individual under Title VII are co-extensive with the individual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. Section 1981, and that the two procedures augment each other and are not mutually exclusive. The bill, therefore, by extending jurisdiction to state and local government employees does not affect existing rights that such individuals have already been granted by previous legislation.

The expansion of Title VII coverage to state and local government employment is firmly embodied in the principles of the Constitution of the United States. The Constitution has recognized that it is inimical to the democratic form of government to allow the existence of discrimination in those bureaucratic systems which most directly affect the daily interactions of this Nation's citizens. The clear intention of the Constitution, embodied in the Thirteenth and Fourteenth Amendments, is to prohibit all forms of discrimination. Legislation to implement this aspect of the Fourteenth Amendment is long overdue, and the committee believes that an appropriate remedy has been fashioned in the bill. *Inclusion of state and local employees among those enjoying the protection of Title VII provides an alternate administrative remedy to the existing prohibition against discrimination perpetuated "under color of state law" as embodied in the Civil Rights Act of 1871, 42 U.S.C. Section 1983.* (Emphasis Supplied.) Legislative History, p. 78[illegible].

At no point in the 2,067 page legislative history is this explicit expression of Congressional intent retracted or modified, a fact which the DISTRICT provides no authority to dispute. Moreover, on February 8, 1972, Senator Hruska (Neb.) proposed Amendment No. 877 to S. 2515 which sought to make Title VII the "exclusive remedy". It stated:

> Except as provided in subsection (b) through (e), (n) and (g) of this section, Section 707 of the Civil Rights Act of 1964 (78 Stat. 255; 42 U.S.C. 2000e-6), as amended, and the Equal Pay Act of 1963 (29 U.S.C. 206(d)(1)), a charge filed hereunder shall be the exclusive remedy of any person claiming to be aggrieved by an unlawful employment practice of any employer, employment agency, or labor organization. Legislative History, p. 1382.

Senator Hruska's amendment was rejected by the Senate on February 9, 1972 Id. 1406-07, and rejected on reconsideration on February 15, 1972 Id. 1520-21.

Thus, as the Seventh Circuit concluded, review of the legislative history of Title VII dictates summary rejection of the DISTRICT'S preemption agreement. Moreover, notwithstanding the DISTRICT'S argument to the contrary, the Sixth Circuit decision in *Day* v. *Wayne County Board of Auditors*, 749 F.2d 1199, 1204 (6th Cir. 1984), decided a year before *Trigg*, and the Fifth Circuit decision in *Rivera* v. *City of Wichita Falls*, 665 F.2d 531, 534, n.4 (5th Cir. 1982), pressage and are consistent with the Seventh Circuit's decisions in *Trigg* and *ALEXANDER*.

III.

REINSTATING THE ALEXANDER EMPLOYMENT DISCRIMINATION COUNTS, THE SEVENTH CIRCUIT FAILED TO DISCUSS THE SEA CLAMMERS AND SMITH v. ROBINSON DECISIONS SIMPLY BECAUSE NEITHER CASE SUPPORTS THE DISTRICT'S POSITION THAT STATE AND LOCAL GOVERNMENT EMPLOYEES ARE LIMITED TO TITLE VII TO REDRESS RACIAL DISCRIMINATION

The DISTRICT argues that the Seventh Circuit ignored this Court's decisions in *Middlesex County Sewerage Authority* v. *National Sea Clammers Association,* 453 U.S. 1 (1981) and *Smith* v. *Robinson,* —— U.S. ——, 104 S.Ct. 3457 (1984), DISTRICT Petition, at 9. The DISTRICT fails to note, however, that it futilely attempted to convince the Seventh Circuit both in its brief *and* in its Petition for Rehearing, even as it attempts to convince this Court now, that the *Sea Clammers* and *Smith* v. *Robinson* decisions require the conclusion that Title VII affords ALEXANDER the exclusive remedy to redress the government's race discrimination. Neither case supports the DISTRICT'S contention. In *Sea Clammers* the Court held that plaintiffs could not use Section 1983 because (1) the *legislative history* of the environmental statutes at issue there (unlike that of Title VII) makes clear that Congress intended plaintiffs suing thereunder to be limited exclusively to the remedies set forth in those statutes; and (2) the existence of comprehensive express remedies demonstrated Congress' intent to supplant any remedy that might be available under Section 1983.

Again, contrary to the DISTRICT'S assertion that the appellate court failed to consider *Sea Clammers,* in *Trigg,* 766 F.2d 302, the Seventh Circuit cites with approval,

Zewde v. *Elgin Community College*, 601 F.Supp. 1237, 1244-46. (N.D. 1984), wherein the district court persuasively demonstrates the inapplicability of *Sea Clammers* (and for that matter *Novotny*):

> These arguments that *Novotny* and *Sea Clammers* apply here by analogy are flawed. In neither case was the plaintiff asserting constitutional rights or substantive rigths other than those created by Title VII or the FWPCA. Section 1985(3) and 1983 were merely conduits in those cases for asserting the Title VII or FWPCA rights. As such, it made sense to imply a congressional intent to prevent plaintiffs from using artful pleading to evade those statutes' restrictions. The analogy to this case would be powerful if Zewde were merely reasserting his statutory, Title VII rights via the Section 1983 conduit. However, the complaint alleges a *constitutional violation* via Section 1983, not a statutory Title VII violation.
>
> . . . . . the holding and spirit of *Sea Clammers* do not run contrary to our holding. It is one thing to say, as the Supreme Court did in that case, that a comprehensive and specific statute like the FWPCA demonstrates implicit congressional intent to repeal the Section 1983 right of action for violation of that statute. It is quite another thing to say, as Elgin does, that the comprehensive Title VII framework demonstrates implicit Congressional intent to repeal the Section 1983 right of action for concurrent violations of the Constitution. Arguably, courts should require express legislative intent to repeal statutory rights of action for constitutional violations. At the very least, Judges should be more hesitant to find an implied repeal of a constitutional right of action than to find one of a statutory violation. In any event, we do not believe that in passing Title VII Congress meant to repeal the concurrent right of action for Constitutional violations.

As has been demonstrated above, the legislative history of Title VII and of the 1972 amendments thereto, which added state and local employees to its coverage, unequivocally establish that Title VII was not intended to preempt actions brought pursuant to Section 1983. Moreover, the fact that there exists a comprehensive enforcement scheme under Title VII does not mean that fundamental constitutional rights "existing for over a hundred years" are impliedly repealed. Accordingly, *Sea Clammers* fails to support the DISTRICT'S position.

Smith v. *Robinson* also fails to aid the DISTRICT. The issue presented there was whether plaintiffs, who had successfully prosecuted certain claims under the Education of the Handicapped Act (EHA), which does not provide for attorneys' fees, could nonetheless recover fees under 42 U.S.C. Section 1988, as a result of having *asserted* due process and equal protection claims under Section 1983 when the constitutional claims had not been reached by the trial court. The district court awarded fees and the appellate court reversed. Although the appellate court acknowledged the general rule that when the claim upon which a plaintiff actually prevails is accompanied by a "substantial" though undecided Section 1983 claim arising from the same nucleus of facts, a fee award is appropriate, it nevertheless held, citing *Sea Clammers*, that plaintiffs could not recover fees because the EHA creates a comprehensive remedial scheme, and international "omissions" (i.e., provision for fees) should not be supplanted by the remedial apparatus of Section 1983.

In affirming the appellate court, the Supreme Court found that "*both* the structure of the EHA, *and* its legislative history", 104 S. Ct. 3468 (emphasis supplied), estab-

lish Congress intended the EHA to be the exclusive avenue for assertion of an equal protection claim to a publicly financed special education. Even though the Court found EHA's structure "comprehensive" and clear, as it had also found the language of the environmental statutes at issue in *Sea Clammers,* and the language of Section 717 of Title VII (i.e., coverage of federal employees) at issue in *Brown* v. *General Services Administration,* 425 U.S. 820 (1976), the Court nevertheless still examined and found *Congress' intent as revealed by the legislative history to be the dispositive factor.*

> Petitioners insist that . . . Congress specifically indicated that it did not intend to limit the judicial remedies otherwise available to a handicapped child. *If that were true, we would agree with petitioners that Congress intent is controlling and that a Section 1983 remedy remained available to them.* See: *Johnson* v. *Railway Express Agency,* 421 U.S. 454, 459 (1975). *The sentence in the legislative history is not the clear expression of Congressional intent petitioners would like it to be.* 104 S. Ct. 3470, n.16. (Emphasis supplied.)

Analysis of *Smith* v. *Robinson* demonstrates the following errors inherent in the DISTRICT'S reliance thereon:

> 1. The DISTRICT'S contention that it is improper to examine the legislative history of Title VII because its structure is "comprehensive", Petition, at 12, is in direct apposition to the method of analysis employed by this Court in *Sea Clammers,* 453 U.S. 1, 16, n. 26; 17, n. 27, *Brown* v. *General Service Administration,* 425 U.S. 820, 827-28, 834, and *Smith* v. *Robinson,* 104 S. Ct. 3470 n.16.
>
> 2. That the Court also scrutinized Title VII's legislative history in *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 47-49 (1974), and in *Johnson* v. *Railway Ex-*

press Co., 421 U.S. 454 (1975) establishes conclusively that the Court considers resort to the legislative history of Title VII essential, thereby further negating the DISTRICT'S argument that Title VII's "comprehensiveness" requires suppression of its legislative history.

3. The DISTRICT'S focus on the rule of construction that resort to the legislative history is required only when the statute is unclear, D. Petition, at 12, ignores an equally, if not more salutary rule, that "repeals by implication are not favored" and "the intention to repeal must be clear and manifest; otherwise the later act is to be construed as a continuation and not a substitution for the first act . . .", *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936); *see also*: *Novotny*, 442 U.S. at 391 (1979), and cases cited thereat.

4. *Smith* v. *Robinson*, does not hold as the DISTRICT seems to argue, that allegation of a constitutional violation will not operate to avoid the effects of *Sea Clammers*, *Novotny* and *Brown*. Rather it holds only that, when the legislative history of a statute clearly demonstrates that rights created under it, and the remedies for enforcing it are intended by Congress to be preemptive, then enforcement of those rights must be predicated on the statute, not the equal protection clause and Section 1983; other constitutional rights, however, may be asserted via Section 1983. 104 S. Ct. 3465 n. 7, 3468.

Unlike the statutes at issue in *Sea Clammers* and *Smith* v. *Robinson*, the legislative history of the 1972 Amendments to Title VII, including as it does *specific* language preserving other remedies, and a record of two separate defeats of Senator Hruska's attempt to make Title VII exclusive, negates completely the DISTRICT'S argument that had the Seventh Circuit considered *Smith* v. *Robinson*, the result would have been different.

IV.

THE SEVENTH CIRCUIT'S RULING (AND THE CONGRUENT RULINGS OF THE OTHER CIRCUITS) THAT STATE AND LOCAL GOVERNMENT EMPLOYEES ARE AFFORDED THE ADDITIONAL REMEDY OF SECTION 1983 IS NOT "ANOMALOUS" AS THE DISTRICT ARGUES, BUT IS WARRANTED PRECISELY BECAUSE GOVERNMENTAL EMPLOYEES HAVE SPECIAL STATUS.

The DISTRICT argues that preservation of *state* employees' remedies under Section 1983 creates the "anomalous" situation that state and local government employees are placed in a preferred status over federal and private employees. Petition at 20-21. As noted in ALEXANDER'S Reply Brief and the Brief Opposing Petition for Rehearing filed with and considered by the Seventh Circuit, the DISTRICT'S "anomalous" argument is devoid of merit because of this Court's directive (expressed anew in *Smith* v. *Robinson*) that "the legislative history [of a statute] . . . is controlling". In adopting the 1972 amendments, Congress underscored the special position state and local governments occupy:

> This failure of state and local governmental agencies to accord equal employment opportunities is particularly distressing in light of the importance that these agencies play in the daily lives of the average citizen. *From local law enforcement to social services, each citizen in a community is in constant contact with many local agencies. The importance of equal opportunity in these agencies is, therefore, self-evident. In our democratic society, participatory government is a cornerstone of good government. Discrimination by government therefore serves a doubly destructive purpose.* The exclusion of minorities from effective participation in the bureaucracy not only promotes

> ignorance of minority problems in that particular community, but also creates mistrust, alienation, and all too often, hostility toward the entire process of government. Legislative History, *supra,* 419. Emphasis supplied.)

It should also be noted that, contrary to the DISTRICT'S contention, *Brown* v. *General Services Administration,* 425 U.S. 820 (1976), which holds that *federal* employees *are* limited to Title VII's remedies, is not "anomalous" in relation to the Seventh Circuit's ruling. In *Brown* the Court held that a black employee of the *federal* government may not use Section 1981, but instead must bring all claims for employment discrimination under Section 717 of Title VII. Analyzing the legislative history of Section 717, the Supreme Court noted that prior to 1972, Title VII did not protect federal employees. Instead, charges of racial discrimination were handled "parochially in each agency", and there was "skepticism among federal employees regarding the Civil Service Commission's record of obtaining . . . adequate remedies". Too, although an action seeking injunctive relief might lie, the doctrine of sovereign immunity made back-pay and compensatory relief largely unavailable. Thus, Congress was persuaded that federal employees had no effective judicial remedy before Section 717 was enacted into law. Accordingly, the Supreme Court found that the legislative history of Section 717 requires the conclusion that Congress intended to create an exclusive, administrative scheme for redress of federal employment discrimination. The Court also found that the "structure" of Section 717 supports its preemptive effect because it details responsibilities for each federal agency, and carefully delineates the administrative responsibilities of the federal Civil Service Commission.

As has been abundantly demonstrated above, the legislative histories of the Civil Rights Act of 1964, and that portion of the 1972 amendments relating to state and local government, are distinguishable from that of Section 717. Moreover, the provisions for agency action and involvement of the Civil Service Commission (i.e., the structure) are unique to federal employees. As a result, the *Brown* decision, instead of supporting the DISTRICT'S theory of the exclusiveness of Title VII, serves to emphasize that Title VII does not preempt ALEXANDER'S Section 1983 claim.

V.

THOSE DISTRICT COURT DECISIONS WHICH HOLD CONTRARY TO THE RULINGS OF THE SEVENTH, SIXTH AND FIFTH CIRCUITS ARE ALSO IN DEROGATION OF THIS COURT'S RULINGS.

At Page 24 of its Petition, the DISTRICT notes that during the past year, before the Seventh Circuit's *Trigg* decision, two district courts (and the *Trigg district court*) held that Title VII affords an exclusive remedy. However, reference to these cases establishes that the analysis (or lack thereof) of these courts is flawed because of the failure to consider the legislative history of Title VII which specifically preserves the Section 1983 rights of state and local government employees, and this Court's decisions which underscore the clarity of Congress' preservation of dual remedies.

VI.

ASSUMING ARGUENDO THAT THE SEVENTH CIRCUIT'S DECISION IS INCORRECT, ALEXANDER'S DISCRIMINATION CLAIMS, FIRST FILED IN 1979, SHOULD NOT BE DEFEATED BY RETROACTIVE APPLICATION OF A RULING THAT TITLE VII IS EXCLUSIVE.

In light of this Court's ruling *in Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-07 (1971), even if it is assumed arguendo that the Seventh Circuit's decision is incorrect, ALEXANDER'S discrimination claims, first filed in 1979, should not be defeated by retroactive application of a ruling that Title VII is preemptive.

CONCLUSION

For the reasons stated above, ALEXANDER respectfully requests that the DISTRICT'S Petition for Certiorari be denied.

Respectfully submitted,

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